THE ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM MARCH, 1914, TO THE END OF JULY, 1914.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

VOL. VI.

Editor:

Edward B. Brown, K.C.

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CASES REPORTED AND NOTED

(Cases marked (*) are reported or to be reported in the Ontario Law Reports.)

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CASES CITED

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The
Ontario Weekly Notes

Vol. VI. TORONTO, MARCH 13, 1914. No. 1

APPELLATE DIVISION.

MARCH 4TH, 1914.

KREUSZYNICKI v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Pickman in Yard by Shunting Cars—Negligence—Evidence—Defective System—Common Law Liability—New Trial—Indulgence—Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 312.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

C. M. Garvey, for the appellant.

Angus MacMurchy, for the defendants, the respondents.

THE COURT granted the plaintiff a new trial, with leave to amend as advised; the costs of the former trial and of this appeal to be costs to the defendants in any event.

MARCH 5TH, 1914.

MERCANTILE TRUST CO. v. STEEL CO. OF CANADA.

Railway—Injury to and Death of Person Employed in Removing Ice from Tracks—Spur Line in Yard of Industrial Company—Negligence in Moving Cars on Tracks—Liability of Railway Company—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendants the Grand Trunk Railway Company from the judgment of MIDDLETON, J., 5 O.W.N. 307.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

D. L. McCarthy, K.C., for the appellants.

W. S. McBrayne, for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs.

MARCH 6TH, 1914.

*PORTERFIELDS v. HODGINS.

Assignments and Preferences—Assignment for General Benefit of Creditors—Wages-claims—Sale and Assignment of, before General Assignment—Preference or Priority of Payment by General Assignee—Assignability of Claims—Wages Act, 10 Edw. VII. ch. 72, sec. 3—1 Geo. V. ch. 25, sec. 45.

Appeal by the defendant from the judgment of LENNOX, J., 29 O.L.R. 409, 5 O.W.N. 162.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. Proudfoot, K.C., for the appellant.

M. K. Cowan, K.C., for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs.

MARCH 6TH, 1914.

GLYNN v. CITY OF NIAGARA FALLS.

Highway—Electric Lighting Plant Operated by Municipal Corporation—Electric Shock Received by Person Leaning against Pole in Street—Defect—Notice—Nuisance—Findings of Jury—Notice of Action—Time for Bringing Action—Public Authorities Protection Act—Application of—Public Utilities Act—Nonrepair of Highway—Nonfeasance—Misfeasance—Municipal Act, 3 Edw. VII. ch. 19, sec. 606—3 & 4 Geo. V. ch. 43, sec. 2—Nonretroactivity.

Appeal by the defendant city corporation from the judgment of BOYD, C., 29 O.L.R. 517, 5 O.W.N. 285.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. E. A. DuVernet, K.C., for the appellant corporation.

A. C. Kingstone, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MULOCK, C.J.Ex. (after setting out the facts and the findings of the jury):—There was evidence to support the jury's findings, and the sole point to determine is whether the cause of action is barred. The defendants contend that it is: (1) by failure to give notice of the accident or to bring an action as required by sec. 606 of the Municipal Act, 1903. (This objection is based on the contention that the negligence complained of was nonfeasance in not keeping the highway in repair); (2) by sec. 13 of the Public authorities Protection Act, 1 Geo. V. ch. 22; (3) by the Pubilc Utilities Act, 3 & 4 Geo. V. ch. 41, sec. 29.

The question involved in the case is not, I think, one of nonrepair, but of nuisance. The electric lighting system was under the control and management of the defendants. Owing to defective insulation, the current reached the chain, and, owing to the length of the chain, the public when using the street were in danger of injury by the current if they came in contact with the chain. Whenever the defendants turned on the current, this danger was imminent; and the defendants in causing such a dangerous condition were maintaining a nuisance upon the public street. . . .

[Reference to Municipal Council of Sydney v. Bourke, [1895] A.C. 441.]

Adopting the reasoning of this case and of Borough of Bathurst v. Macpherson (1879), 4 App. Cas. 256, I think that the defendants, as authors of the nuisance complained of, became liable in a civil action to the plaintiff, who suffered special damage therefrom. Thus the first objection fails.

As to the second objection, sec. 17 of the Public Authorities Protection Act enacts as follows: "This Act shall not apply to a municipal corporation." Therefore, the limitation contained in sec. 13 of that Act in the bringing of actions against a municipality constitutes no defence.

Dealing with the third objection, sec. 29 of the Public Utilities Act is as follows: "No action shall be brought against any person for anything done in pursuance of this Act, but within six months after the act committed, or, in case there is a continuance of damage, within one year after the original cause of action arose." In this case the cause of action arose on the

24th March, 1912; the writ was issued on the 22nd March, 1913; and the Public Utilities Act was assented to on the 6th May, 1913.

If that Act is construed as the defendants urge, it would leave the plaintiffs with a non-enforceable right. It is a rule of construction that rights of parties should not be defeated by new Acts unless the intention of the Legislature is clear that they are to have a retrospective effect (Gilmore v. Shuter, 2 Mod. 310; Ashburnham v. Bradshaw, 2 Atk. 36; Moon v. Durden, 2 Ex. 22; Towler v. Chatterton, 6 Bing. 258); and, whilst no person has a vested right in any course of procedure (Costa Rica v. Erlanger, 3 Ch.D. 69), and whilst there is no presumption against the retrospective operation of legislation which affects procedure only (Wright v. Hale, 6 H. & N. 227), nevertheless an intention to do injustice is not to be imputed to the Legislature; and where an enactment, if given a retrospective effect, would work an injustice, it should not be so construed, unless its language satisfies the conscience of the Court that such was the intention of the Legislature. . . .

[Reference to The Queen v. Leeds and Bradford R.W. Co. (1853), 18 Q.B. 346; The Queen v. Inhabitants of Crowan (1849), 14 Q.B. 221.]

The Ydun (1899), 81 L.T.R. 81, relied on by the defendants, can have no application here. . . .

If the section under consideration came into effect as against these plaintiffs on the day when the Act was assented to, then at the moment of its passing it became an absolute bar to the plaintiffs' cause of action. Before it should be held that the Legislature intended such an unjust result, such an intention should clearly appear in the Act. It does not, and I, therefore, think it should not be construed as having a retrospective operation.

Further, it would, I think, be doing violence to the language of the section if it were construed retrospectively. It begins thus: "No action shall be brought . . . but within six months after the act committed," etc. Actions already brought are by the language of this section excluded from its operation—its plain meaning being that it shall only apply to actions thereafter brought.

I, therefore, think the third ground of defence also fails, and that this appeal should be dismissed with costs.

MARCH 6TH, 1914.

*CANADIAN WESTINGHOUSE CO. v. MURRAY SHOE CO.

Sale of Goods—Conditional Sale of Electric Motors—Agreement between Vendor and Vendee—Property and Title not to Pass until Payment—On Default Vendor to be at Liberty to Retain Moneys Paid and Retake Motors—Installation of Motors on Premises of Stranger to Agreement—Knowledge of Vendor—Removal of Name-plate—Claim against Estate of Vendee in Liquidation—Nothing Realised from—Action by Vendor against Person in Possession of Motors—Rights of Vendor — Conditional Sales Act — Election — Common Law Rights—Estoppel.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

G. S. Gibbons, for the appellants.

G. C. Thomson, for the plaintiffs, the respondents.

The judgment of the Court was delivered by RIDDELL, J.:—

A contract was entered into by the plaintiffs and the Parkin Elevator Company Limited, of Hespeler, whereby the plaintiffs furnished the Parkin company two electric motors. "The property in and title to" them was agreed not to pass from the plaintiffs until "all payments . . . shall have been fully made in cash . . . and the said apparatus shall remain the personal property of the company . . . until fully paid for in cash." "If default is made in the full payments in the manner and form herein specified, the company may retain any and all partial payments . . . as liquidated damages, and shall be free to enter the premises where such apparatus may be located and remove the same as its property."

The payments were ($280 being the price) 50 per cent. cash by sight draft attached to bill of lading, 40 per cent. cash by sight draft in 30 days, and 10 per cent. in 60 days.

The contract is dated the 5th July, but it was not to be effective until approved by the plaintiffs, and that was done on the 6th August.

*To be reported in the Ontario Law Reports.

On the 23rd July, the Parkin company wrote the plaintiffs saying that the motors were to be supplied to the Murray Shoe Company, London, the defendants; and on the 3rd August the defendants wrote the plaintiffs to the same effect; so that, at the time the contract became effective, the plaintiffs knew that the motors were to be installed in the defendants' premises as part of their elevator.

But they were sent on to the Parkin company with name-plate attached, on the 29th July, before formal acceptance of the contract; and were shortly afterwards installed in the defendants' premises, the name-plate having been removed. A sight draft for half the price was attached to the bill of lading and paid; the whole price being increased by extras to $293.

No further or other sum has been paid, and the plaintiffs claim that there is still $140 of the price of the motors unpaid. Efforts were made to obtain payment from the Parkin company, but in vain. In March, 1910, the Parkin company went into liquidation, and the plaintiffs put in a claim against the company for the balance due on the motors and an open account, but nothing has been paid. It is said that there is nothing in the estate. The plaintiffs had, before the liquidation, included the amount of the claim on the motors in drafts, which also included other claims.

Not realising anything from the insolvent company, the plaintiffs notified the defendants, on the 31st July, 1911, of the balance due on the motors, which was alleged to be $146.50, asked them to remit the amount, and threatened to take possession unless they were paid. The defendants refused, and this action was brought claiming the motors. The case came on for trial before the Senior County Court Judge at Hamilton, and he gave judgment in favour of the plaintiffs for $140 and costs. The defendants now appeal.

The removal of the name-plate does not diminish the plaintiffs' rights: Wettlaufer v. Scott (1893), 20 A.R. 652; and their rights must be tested by the contract whereby they gave up possession of their goods.

In this inquiry I entirely agree with Mr. Gibbons's contention that the Conditional Sales Act does not enlarge the common law rights of those who allow their goods out of their hands, but it prevents all from asserting such common law rights who have not complied with its conditions. The plaintiffs have complied with these conditions, and must be held

entitled to all the rights the law would have given them had the statute not been passed, and to no more.

It was argued that the filing of a claim before the liquidator was equivalent to an action at law, and that this was in itself an election to treat the property as having passed. This appears to be the law in some of the States of the Union: Moline Plow Co. v. Rodgers (1894), 53 Kans. 743; but it is not our law. The matter has been fully discussed by a Divisional Court in Utterson Lumber Co. v. H. W. Petrie Limited (1908), 17 O.L.R. 570. I think that case is well decided and should be followed. McEntire v. Crossley, [1895] A.C. 457, mainly relied upon in support of this appeal, is considered in that case. . . .

What is strongly urged upon us in the McEntire case (followed as it is in Purtle v. Heney (1896), 33 N.B.R. 607) is what is said by the Lord Chancellor at pp. 464, 465. . . .

But, as it is pointed out in the Utterson case, the McEntire decision is on a special contract in which the vendor is bound down to two alternatives—he is given the right on default of an instalment to call all the money payable, or, "instead of seeking to recover such balance," to take possession.

There is no such clause here. The vendor may, on default, retain all that has been paid and take possession of the apparatus. But this is not given as an alternative of calling all the instalments due, and suing for them; this right he has not been given at all.

I see no sound reason why the plaintiffs should not avail themselves of their common law rights without troubling with the special right given by the contract. These are to sue for the instalments as they become due, and retain the property in the motors till the amount is paid in cash.

The claim before the liquidator can have no higher effect than an action at law.

Then it is contended that the plaintiffs are estopped by their knowledge that the motors were to be installed in the defendants' premises. What they knew was, that the defendants were installing two elevators with their motors, and the Parkin Elevator Company were doing the work (letter of the defendants of the 3rd August); that the two motors were to be supplied by the Parkin company to the defendants (letter of the Parkin company of the 23rd July). They also knew that in their contract the Parkin company had expressly agreed "to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in" the plaintiffs.

I see nothing to indicate that the plaintiffs knew or should have known that the defendants were buying and paying for the motors out and out, and that the Parkin company were not observing their agreement. . . .

[Reference to Mississippi River Logging Co. v. Miller (1901), 85 N.W. Repr. 193; Pickering v. Pusk (1812), 15 East 38; Winchester Wagon Works and Manufacturing Co. v. Carman (1886), 109 Ind. 31.]

Without expressing any opinion on the general question, I think there is no estoppel.

Appeal dismissed with costs.

MARCH 6TH, 1914.

*NIAGARA NAVIGATION CO. v. TOWN OF NIAGARA.

Highway—Evidence to Establish—Title to Land—Statutes—Surveys—Plan—Patent from Crown—Absence of Proof of Original Survey—Admissibility of Other Plans—Title by Possession—Rights of Crown and Municipality—Municipal Act, 1903, *secs.* 598, 599, 601—*R.S.O.* 1897 *ch.* 181, *secs.* 14, 15—*By-law.*

Appeal by the defendant corporation from the judgment of MEREDITH, C.J.C.P., 5 O.W.N. 46.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. N. Tilley and A. C. Kingstone, for the appellant corporation.

E. D. Armour, K.C., for the plaintiff company, the respondent.

SUTHERLAND, J.:—The defendant corporation on the 14th December, 1911, passed its by-law No. 619, to open up certain streets in the town of Niagara, in the county of Lincoln, and, among others, Nelson street, from Ricardo street north to the Niagara river. Thereafter the defendant corporation notified

*To be reported in the Ontario Law Reports.

the plaintiff company to remove a wire fence erected by it, which ran across Nelson street at the north side of Ricardo street. The plaintiff company, alleging that the fence was on their own property in the said town . . . declined to remove it, whereupon, under the directions of the defendant corporation, it was taken down.

The plaintiff company then brought this action for damages, an injunction, and a declaration that the defendant corporation had no right to enter upon the plaintiff company's lands. . . .

The action was tried before Meredith, C.J.C.P., who directed judgment to be entered for the plaintiff company for $25 damages, and for costs. In his judgment he deals with two questions: (1) whether the place in question ever was a highway; and, if so, (2) whether it had ceased to be such by reason of the exercise of the power conferred by an Act of Parliament. . . .

[The learned Judge dealt with the plaintiffs' title, referring to the statute 1 Wm. IV. ch. 13, incorporating the Niagara Harbour and Dock Company; the amending Acts 14 & 15 Vict. ch. 153, 15 Vict. ch. 70, 16 Vict. ch. 145; certain conveyances, patents, plans, decrees, mortgages; the defendant corporation's Act of incorporation, 8 Vict. ch. 62, secs. 2, 45. He then referred to by-law No. 619 and to certain negotiations and correspondence and the testimony given at the trial.]

It is contended on behalf of the plaintiff company that the defendant corporation has not shewn any original survey, but as to this the line of reasoning of Robinson, C.J., in . . . Badgely v. Bender (1833), 3 O.S. 221, may well be applied. . . . It was held that "a piece of land marked out in the original plan of the township as an allowance for road does not lose that character because it has never been used as a road for a period of forty years, and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom nor from what material the plan was compiled. . . .

[Remarks of Robinson, C.J., at pp. 225, 227, and of Macaulay, J., dissenting, at pp. 230, 232. Reference also to Kenny v. Caldwell (1894), 21 A.R. 110, affirmed in Caldwell v. Kenny (1895), 24 S.C.R. 699; Horne v. Munro (1858), 7 C.P. 433.]

I am of opinion that, under the circumstances of this case, the two plans . . . may well be taken to shew clearly that Nelson street was laid out as an original highway, even before the passing of the dock company's Act of incorporation in 1831.

Between 1831 and 1863, we have three plans of Chewett, the Royal Engineers' plan of 1832, and the Passmore plan of 1852, all shewing Nelson street as extending north of Ricardo street to the river, and the last-named of these plans indicates on its face that it was made after Passmore had made a full investigation of records, titles, posts, foundations, buildings, etc. The Rykert plan, December, 1863, . . . shews that part of Nelson street lying north of Ricardo street and in question almost, if not quite, as large in extent of territory as that part of Nelson street lying between Byron and Ricardo streets and as extending to the bank of the river. . . .

Even if the plaintiff company could acquire a title by possession against the Crown and the defendant corporation, I do not think that the evidence can be considered as at all satisfactory on the question of any continuous and exclusive possession. I am of opinion, however, that it could not thus acquire a title. I do not think that it is proved that the plaintiff company made the ground now constituting that part of Nelson street north of Ricardo street; but, even if they did, the work was done long before the patent of 1866. . . .

[Reference to the Municipal Act, 1903, secs. 598, 599, 601.]

The freehold is in the Crown, but there is vested in the municipalities a "qualified privilege to be held and exercised for the whole body of the corporation:" Town of Sarnia v. Great Western R.W. Co. (1861), 21 U.C.R. 59, at pp. 62 and 64.

The defendant corporation in this action also lays much stress on the Niven survey and the effect of the confirmatory order of the Minister under . . . R.S.O. 1897 ch. 181, secs. 14 and 15.

The plaintiff company apparently was given every opportunity before the Commissioner to represent what it is now urging in this action, namely, that no survey should be directed or authorised which would appear to shew that Nelson street north of Ricardo was a street or highway or anything other than its own private property. After hearing such representations, the Commissioner apparently decided against the company, and affirmed the survey as shewn on Niven's plan. By it Nelson street appears as an open highway from Byron street to the river.

The council of the defendant corporation thereafter, in pursuance of a general scheme for opening streets, including that part of Nelson street in question, took the necessary proceedings to pass a by-law for the purpose. The plaintiff company,

though threatening an action to restrain the passage of the by-law, refrained from bringing one, and the by-law was formally adopted. This survey and by-law strengthen the position of the defendant corporation.

The learned trial Judge seems to have treated the question, to some extent at all events, as a mere question of the possible user of the extreme end of Nelson street for the purpose of getting access to the harbour or otherwise.

I think that the defendant corporation has shewn that the land in question is a highway. I do not think that the plaintiff company has shewn that it has "ever ceased to be such by reason of the exercise of the power conferred by the Act of 1831."

I am unable to see that the plaintiff company ever acquired any title to it. I think, moreover, that the plaintiff company took, subject to the reservation in the patent and according to the plan referred to in the description of the property therein contained.

I would allow the appeal of the defendant corporation with costs here and below.

MULOCK, C.J.Ex., and LEITCH, J., agreed in the result and with the reasons of SUTHERLAND, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

MARCH 6TH, 1914.

*HUDSON v. NAPANEE RIVER IMPROVEMENT CO.

Negligence—Death by Drowning of Person Attempting to Cross River—Action under Fatal Accidents Act—Broken Dam—Findings of Jury—"By not having Watchmen"—Other Grounds of Negligence Relied on, Not Found, and so Negatived—Liability for Wrongful Act of Stranger—Destruction of Property—Voluntary Assumption of Risk—Contributory Negligence of Deceased—Dismissal of Action—Appeal.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 467, dismissing the action without costs.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

Eric N. Armour, for the appellant.

W. S. Herrington, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by MULOCK, C.J. Ex. (after setting out the facts and the findings of the jury) :— The only finding of negligence on the part of the defendants is in the answers to the first two questions, the specific negligence found being "by not having watchmen."

According to the rule laid down in Andreas v. Canadian Pacific R.W. Co. (1905), 37 S.C.R. 1, the jury's findings negative all negligence by the defendants except (if it be negligence) "not having watchmen;" thus the defendants are not found guilty of any wrongful act in connection with the erection, maintenance, or destruction of the dam or escape of the water.

Nevertheless, the plaintiff says that under the doctrine laid down by Mr. Justice Blackburn in Fletcher v. Rylands (1866), L.R. 1 Ex. 265 (affirmed in Rylands v. Fletcher (1868), L.R. 3 H.L. 330), the defendants are liable for the wrongful act of a stranger who, without the defendants' privity or knowledge, destroyed the dam, whereby the water was enabled to escape.

. . .

[Quotation from the judgment of Blackburn, J., at p. 279, and reference to the facts of the case of Fletcher v. Rylands, and the judgments of the House of Lords in Rylands v. Fletcher; reference also to Nichols v. Marsland (1875-6), L.R. 10 Ex. 255, 2 Ex. D. 1; Rickards v. Lothian, [1913] A.C. 263; Box v. Jubb (1879), 4 Ex.D. 76, 79.]

It is not necessary further to multiply authorities in order to shew that the law is not, as contended for by the plaintiff, that under all circumstances a person is liable for damages caused by water lawfully stored by him on his own premises, which, through no fault of his, escapes and causes injury.

To establish a liability there must be evidence which would warrant the jury in finding, and there must also be a finding by the jury, that there is available to the defendants reasonable means which they ought to have adopted and which, if adopted, would have prevented the blowing up of the dam.

The appointment of watchmen by the defendants was, in my opinion, not a reasonable means which the defendants were bound to adopt. I am aware of no law which makes it the duty

of the owner of premises to appoint as many men and for so long a time as may seem necessary in order to prevent a malicious portion of the public from destroying his property, and that, if he fails to do so, he should then be liable to his neighbours for injury to them caused by the destruction of his property. If such were the law, a serious obligation would devolve upon every man who erects a structure on his land, for property maliciously destroyed may in its destruction involve that of another. . . . The duty, and with it the expense, of preventing crime, devolves upon the public authorities, not the private citizens. . . .

I am of opinion that, the destruction of the dam having been caused by unknown persons, through no fault of the defendants, they are not liable for the injury caused by the escaping water. Adopting this view, it is not necessary at any length to analyse the evidence as to whether the deceased was guilty of contributory negligence. It is sufficient here to say that I entirely agree with the learned trial Judge that the deceased did not exercise reasonable care in endeavouring to pass through a very powerful current of water which had so completely submerged the travelled road that it was impossible for him to know that it furnished safe footing for his horse.

The appeal, I think, should be dismissed with costs.

MARCH 6TH, 1914.

FRETTS v. LENNOX AND ADDINGTON MUTUAL FIRE INSURANCE CO.

Fire Insurance—Automobile—Addition to Policy of Words "Or Owned by Assured"—Insurance without Reference to Place of Storage—Third Statutory Condition—License of Insurance Company—Confinement to Isolated Risks—Evidence—Limitation of Amount Recoverable—Buildings not the Property of Assured—Evidence.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Frontenac in favour of the plaintiff for the recovery of $375 and costs.

The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., SUTHERLAND and LEITCH, JJ.

W. S. Herrington, K.C., for the appellants.

E. G. Porter, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—The action is on a fire insurance policy, issued by the defendants on the 23rd March, 1911, whereby they insured the plaintiff for three years from the 23rd March, 1911, against loss by fire, to the extent of $500, in respect of an automobile, which was thereafter, namely, on the 23rd April, 1913, damaged by fire.

The following are the defendants' grounds of appeal:—

First, that the automobile is, in the plaintiff's application for insurance, described as situate on lots 18 and 19 in the 3rd concession of the township of Fredericksburg; that the said application also described the buildings on the said lands as consisting of ordinary farm buildings and an automobile house, and that the plaintiff thereby represented to the defendants that the automobile, when not in use, was being stored in the said automobile house, whilst, at the time of its being damaged by fire, it was, and for several weeks had been, stored in a paint shop and garage in the city of Kingston, and its removal from the said lands to the said paint shop and garage was a change material to the risk, within the meaning of the third statutory condition; that the plaintiff omitted to notify the defendants in writing of such change; and that, by reason of such omission, the policy became void.

Second, that the defendants by their license were not entitled to insure other than isolated risks, and that the risk in question was not one of that kind.

Third, that, by reason of certain terms in the application for insurance, the plaintiff is not entitled to recover more than 70 per cent. of the loss.

The application for insurance, as it was originally signed by the plaintiff, thus refers to the automobile house and automobile: description of the automobile house and automobile, "automobile house and hen house combined; automobile in the storage house or on the road."

When the plaintiff received the policy, he was not satisfied with the reference therein to the automobile, and returned the policy to the defendants; and, to meet his objection, the company's board amended the application and the policy by insert-

ing in the application and in the policy the words "or owned by the assured." Thus the description in the application for insurance is now in these words: "automobile in the storage house or on the road or owned by the assured." The plaintiff accepted the policy as amended, and thereafter paid subsequent assessments on his premium note given for the policy.

The words of the policy do not, I think, admit of the interpretation sought to be placed upon them on behalf of the defendants. The company insured the automobile "while in the storage house or on the road or owned by the assured." It was owned by the assured at the time of the fire. The words "or owned by the assured," deliberately added to the policy, had the effect of freeing the plaintiff from any obligation to store the automobile in his own storage house. If it had been intended that such obligation should still exist, then other words should have been used—for example, instead of the word "or," the word "whilst."

Inasmuch, however, as the two parties deliberately adopted the precise words added to the application and to the policy, we are not entitled, I think, to give to them any other than their fair literal meaning. I, therefore, think that the policy as amended insured the automobile without reference to where it might be from time to time. Thus, the plaintiff being entitled by the wording of the policy to place the automobile where it was when burnt, the third statutory condition is not applicable to the facts of the case.

The second objection, that the company by their license must confine their insurance to isolated risks, must also fail. The policy was dated and issued on the 23rd March, 1911. Its alteration was authorised on the 3rd June, 1911. The policy is for three years, dated from the 23rd March, 1911, and the plaintiff has paid the three annual premiums payable under the policy. The alteration relates back to the commencement of the policy, namely, the 23rd March, 1911. The defendants put in licenses to do business for three years commencing with the 1st July, 1911, but no license was given in evidence as to the powers of the company prior to that date.

Thus it does not appear that the defendants were limited to effecting isolated risks of insurance when the policy in question was issued.

As to the defendants' contention that at most they are only liable to an amount not exceeding 70 per cent. of the value of the property destroyed, the words of the application on which

the defendants rely are as follows: "And it is further understood and agreed between the assured and the company that, where the buildings are not the property of the assured, this company will in no case pay an amount to exceed 70 per cent. of the actual cash value on the loss of the property destroyed or damaged by fire." The buildings here referred to are those mentioned in the application; and, even if the words "property destroyed or damaged by fire" apply to the automobile, or if the claim itself applies to the automobile, which was insured at large, there is no evidence that "the buildings are not the property of the assured;" so that the plaintiff's claim is not limited to 70 per cent. of his loss.

For these reasons, I think the appeal should be dismissed with costs.

MARCH 6TH, 1914.

HEWITT v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Life Insurance—Benefit Society—Member—Status at Time of Death—Annual Payments—Rules of Society—Construction and Operation—Nonretroactivity—Forfeiture or Suspension—Want of Notice—Insurance Corporations Act, 1892, *sec.* 40 (1)—*Insurance Act, R.S.O.* 1897 *ch.* 203, *sec.* 165—*Action for Insurance Benefit—Parties—Executors of Assured—Proofs of Loss—Waiver.*

Appeal by the plaintiff from the judgment of KELLY, J., at the trial, dismissing the action, which was brought by the daughter and residuary legatee under the will of James Hewitt, deceased, to recover the sum of $1,000, the amount of a policy of insurance or endowment certificate issued to the deceased by the defendants.

The appeal was heard by MULOCK, C.J.Ex., SUTHERLAND, LATCHFORD, and LEITCH, JJ.

A. J. Russell Snow, K.C., for the appellant.

J. A. Worrell, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by SUTHERLAND, J.:— . . . The contention of the defendants is, that, as Hewitt

was not at the time of his death in "good standing," he had lost "all rights and claims upon the benefit fund" of the "Orange Mutual Benefit Society of British America," established by the Grand Orange Lodge, and to which the policy or certificate had reference.

Hewitt had been a member of the Orange Order prior to the 24th January, 1888; and, being then in good standing therein and desiring to take advantage of the benefits of the Orange Mutual Benefit Society, made written application for membership. It contained an agreement on his part to be bound by the rules and regulations then in force or thereafter to be adopted; and, being accepted, a certificate of membership, dated the 28th January, 1888, was issued to him containing a similar agreement. . . .

Under the rules in force in the Orange Mutual Benefit Society at the time Hewitt joined, if he withdrew from membership in the Order, he ceased to be a member of the benefit society, and in case of death his representatives would be disentitled to any benefit therefrom: rule 4.

Rules were subsequently passed on the 1st February, 1893, permitting members of the Orange Mutual Benefit Society to withdraw from the Orange Order and still retain membership in the Mutual Benefit Society. . . .

The last-mentioned rules were apparently in force in 1901. It was proved at the trial that in June of that year Hewitt withdrew from the Orange Association, and the report of his withdrawal was made by the Lodge of which he was a member to the District Lodge. It was also proved that at the time of such withdrawal Hewitt was a member of the Order in good standing, and received a certificate to that effect. He apparently intended to continue a member of the Orange Mutual Benefit Society, as he paid regularly the monthly assessments demanded by the society, and, in addition, a fee of $2 annually in advance in October of each year, up to the time of his death. Undoubtedly he continued to the end to think he was a member of the benefit society.

The rules were amended in 1906, and I quote from rule 5 part of clause (b): "In the event of a member of the benefit fund withdrawing from membership in the Orange Association . . . such member may, by notifying the secretary of the benefit fund, in writing, of such withdrawal, within one month from the date thereof, and paying within the same time the sum of $2 to the benefit fund, and by paying in addition to all other

assessments a similar sum of $2 in advance on the 2nd day of January in each year after such withdrawal, continue to be a member of the benefit fund, and he, or in case of his death his representatives, shall be entitled to the benefits of the fund in the same manner as if connection with the Orange Association had been maintained, but the giving of said notice and the making of said payments are conditions precedent to his representatives being so entitled to said benefits. Provided that, if such withdrawal takes place after the 1st day of July in any year, the amount of the annual fee payable on the 2nd day of January in the year thereafter shall be $1 instead of $2." . . .

Further rules were passed in 1907. In rule 5, clause (b), there is the following slight change: "Provided that, if such withdrawal takes place after the 1st day of July in any year, the amount payable at the time of withdrawal shall be $1."

Further rules were put in at the trial, for 1909 and 1911, which latter are said to be the rules in force at the time of Hewitt's death, which occurred on the 19th March, 1912; but these rules make no changes of importance.

It is apparent from the reception by the society of his monthly dues and the annual sum of $2 payable in each year in October down to the year in which he died, that the Mutual Benefit Society continued to regard him, up to his death, as a member thereof. This indeed is also admitted.

The defendants say that it was only after his death that for the first time they learned that he had withdrawn years before from the Orange Association. They contend that no notice of the withdrawal was ever communicated to them by him or by the original Orange Lodge of which he was a member or by the District Lodge, to which, as already stated, the notice of his withdrawal had been communicated.

They also contend that, under secs. 5 and 40 of the rules in existence in 1901, the annual sums of $2 required to be paid are different sums; and that, as Hewitt only paid one of these, namely, that required to be paid in October, and made default in payment of the other, he forfeited, from the time of the first default, his right to continue a member, and the right of his representatives on his death to any advantage under his certificate.

They contend further that in 1906 he did not give the notice of withdrawal then required by rule 5, as amended, and did not pay the withdrawal fee of $2. They also contend that, under rule 5, it became then clear, if there was doubt before, that a

second annual fee of $2 was payable in January of each year, and that Hewitt, failing to pay the same, was in default for years before his death, and thereby, under rules 9 and 10, forfeited his right to continue a member, and the right of his representatives to assert any claim under his certificate. . . .

I am of the opinion that the very language of rule 5 in the rules of 1906 shews it to be applicable only to members who should withdraw after it came into force. I am of opinion, therefore, that the society, having by its rules in force in 1901 permitted a member in the Orange Order to withdraw therefrom in an apparently regular and accepted way, and not having made it clear by sec. 5 of the rules then in force that two annual sums of $2 were required to be paid, cannot now be heard to say that, in consequence of Hewitt having failed to pay one of them, he was not at the time of his death in good standing, and his representatives can make no claim on the benefit fund. The society treated him as in good standing down to the time of his death; and he, no doubt, considered that he was.

On the defendants' own shewing and admission, the situation is, that he, in ignorance of the fact, even if it were the fact, that he was required to pay two annual sums of $2, continued to pay all other required assessments and make one annual payment for years after he had withdrawn, when it is plain, as it seems to me, from that very fact, that, if he had known that another was required, he would have paid it also, and they continued to receive from him such assessments and such annual payment of $2 when it was improper for them to receive them except upon the assumption that he was still in good standing. All this is quite inconsistent with the view that the defendants now put forward, namely, that he made default years before his death, and, in consequence, was at that time no longer in good standing, and his representatives disentitled to make any claim upon the benefit fund. His certificate had not been forfeited and was apparently a valid and subsisting one at his death.

It is said that before action the defendants were willing to refund the assessments and annual sum of $2 received from Hewitt from 1901 to the time of his death. He had, of course, been paying into the fund for years before that time. Where each party to a contract has gone on recognising it as valid and subsisting up to the death of one of the parties, the one in ignorance that he should pay more and the other that it should receive none of the moneys or else more, it is rather late for the latter to repudiate the contract in toto. Instead of offering to

return the moneys paid since 1901, one would have thought a fairer proposition, under the circumstances, would have been to request payment of the additional annual sum of $2 claimed to have been payable, with or without interest, or with the right to deduct the same from the $1,000.

The plaintiff also contends that by the statute-law it was, under the conditions disclosed in the evidence and by-laws, impossible to forfeit the deceased's certificate. The Insurance Corporations Act, 1892, 55 Vict. ch. 39, sec. 40, sub-sec. (1), provides as follows: "No forfeiture or suspension shall be incurred by any member of a friendly society or person insured therein by reason of any default in paying any contribution or assessment, except such as are payable at fixed dates, until after notice to the member stating the amount due by him and apprising him that in case of default of payment by him within a reasonable time, not being less than thirty days, and at a place to be specified in such notice, his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice."

By the Insurance Act of 1897, 60 Vict. ch. 36, sec. 165 (R.S.O. 1897 ch. 203, sec. 165), sec. 40 of the Act of 1892 was amended from the point where the words "thirty days" appear therein so as to read as follows: "to the proper officer to be specified in such notice, his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice."

The Act of 1897 continued in force down to the time of Hewitt's death. In rule 5 of the society's rules of 1893, in force at the time that Hewitt withdrew from the Order in 1901, it is, I think, clear that "no fixed date" is provided for the annual payment of the $2 therein mentioned. The defendants' argument is, that it may be or must be inferred that the expression "shall pay annually in advance the sum of $2 in addition to his assessments," meant pay annually in advance either from the date of withdrawal or from the 1st January next following. But neither is fixed as the date; no date is fixed.

From 1901 until 1906, therefore, it is clear that, even if the sum of $2 was additional to that provided to be paid under rule 40, and Hewitt failed to pay it, no forfeiture or suspension would ensue without notice. It is, of course, not pretended that he received any such notice.

But, when the society amended its rules in 1906, and made the date for payment of the $2 a fixed one, was the result, in case Hewitt failed to pay as he did, that such failure brought about a forfeiture of his certificate?

It is clear that he did not know that such annual payment was to be made at all. He had not been asked to pay it before, although the defendants now contend that it had been payable before. He was not asked in or after 1906 to pay it. No intimation was given to him that in consequence of such rule, and his non-payment thereunder, his certificate had been or would be forfeited. Even though he had agreed to be bound by rules which might be subsequently adopted, his contractual rights could not be so seriously affected without it being incumbent upon the society to shew that he had received from it notice of the coming into force of rules bringing about such a result. There is no absolute evidence that he ever did receive even a copy of the rules. The evidence as to sending copies thereof to all members in 1906 is of a general character. If we can infer anything from Hewitt's course of conduct after 1906, it is clear that he either did not receive the rules, which is most probable, or did not appreciate their alleged applicability to his case. . . .

[Reference to Maxwell on Statutes, 4th ed. (1905), p. 323.]

I am of opinion that rule No. 5, as amended in 1906, cannot be said to have applied to Hewitt or to have a retroactive effect on his contract with the society. But, in any event, I think that, before the society could contend that he was bound thereby to such an extent as to enable them to forfeit his certificate, it must be incumbent upon them to shew clearly that the section in question does apply to him, and that he had received notice of its coming into force.

I am of opinion that the judgment should be set aside. The trial Judge has indicated in his judgment what may well be done in case the defendants still put forward the contention that proofs have not been supplied in the terms of the contract, or that the proper parties, namely, the executors of the testator, are not before the Court to receive the moneys claimed. The defendants have been repudiating liability altogether, and in that view would appear to have waived the necessity on the part of the plaintiff to furnish proofs in strict accordance with the contract, when, if furnished, the defendants would still resist payment on the other grounds indicated.

It is, I understand, contended on behalf of the plaintiff that

strict compliance with the necessary proofs could not be made owing to the defendants refusing to give a certificate to the effect that the deceased was in good standing at the time of his death. Any necessary amendments may be made and the time extended for putting in further proofs, if required.

There will be judgment for the plaintiff, or the executors if they consent to be added as plaintiffs, for the amount claimed, with suitable interest and costs, or, if the executors decline, they may be added as defendants, and payment made to them.

Appeal allowed.

HIGH COURT DIVISION.

LATCHFORD, J., IN CHAMBERS. MARCH 2ND, 1914.

BAIN v. UNIVERSITY ESTATES LIMITED AND FARROW.

CONNOR v. WEST RYDALL LIMITED AND FARROW.

Writ of Summons—Service on Defendants out of Jurisdiction—One Defendant in Jurisdiction—Proper Parties—Rule 25—Conditional Appearance—Rule 48.

Appeals by the plaintiffs in the two actions from orders of the Master in Chambers permitting the defendant corporations to withdraw the ordinary appearances they had entered in the actions after service upon them out of the jurisdiction of concurrent writs of summons, under an order of a Local Judge of the Supreme Court of Ontario, and allowing them to substitute therefor conditional appearances, under Rule 48.

A. B. Cunningham, for the plaintiffs.
Grayson Smith, for the defendant corporations.

LATCHFORD, J.:—The appeals were argued together. There is no substantial difference between the two cases as to the point now involved. In both, statements of claim had been filed and served; and in one, the statement of defence. In the other, the defence was due when the motions for the orders appealed against were made.

The writ in each case states that the plaintiff's claim is to set aside an agreement for the purchase and sale of lands situate in the Province of Manitoba, and to recover from the defendants moneys paid to them by the plaintiff. Each agreement is alleged to have been made with the land company through the fraud and misrepresentation of the defendants, i.e., the land company and Farrow, who is resident in Toronto.

Inadvertence is stated to have led to the entry of the appearances. To ascertain what that inadvertence was—the material being silent on the point—a reference to the Rule under which a conditional appearance can be entered may be illuminating.

Rule 48 provides that where a defendant desires to contend that an order for service out of Ontario could not properly be made, a conditional appearance may be entered by leave. This Rule embodies the former Con. Rule 173 and the form of conditional appearance: Holmested & Langton's Judicature Act, Form 105.

The only inadvertence, therefore, was, that the defendant companies did not appear in a way which would enable them to contend that the order for service out of the jurisdiction could not properly be made.

The question of jurisdiction is the only question that can be opened up if the orders of the learned Master are allowed to stand. It was squarely raised before me and can better be disposed of now than at a subsequent time.

Under Rule 25, "service out of Ontario of a writ of summons . . . may be allowed wherever . . . (*g*) a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario."

Each action was properly brought against a person other than the land company, and that person—Farrow—was duly served within Ontario.

Farrow acted for principals not resident or having any office or property, so far as appears, in this Province. His acts, however, were for the benefit of such principals, who, directly or through Farrow, received the money which the plaintiffs now seek to recover from them and him.

They are, I think, necessary as well as proper parties. Quite obviously, upon the facts disclosed, they are either one or the other. The Court therefore has jurisdiction. No useful purpose can be served by the orders appealed from, while they render uncertain and embarrassing the position of the plaintiff

in each case. As my brother Middleton said in Standard Construction Co. v. Wallberg (1910), 20 O.L.R. 646, at p. 649, when a case is shewn within the Rule—then Con. Rule 162 (g), identical with Rule 25 (g)—there is no reason why a conditional appearance should be entered.

That case is still an authority, the Rule on which it was rendered remaining unchanged in the revision.

Accordingly, I reverse the orders appealed from. The costs in each case to be to the plaintiff in any event of the action.

BRITTON, J. MARCH 2ND, 1914.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. BRADEN.

Company—Shares—Subscription for—Conditions — Allotment —Acceptance—Subscriber Acting as Director—Payment of First Call — Approbation of Contract — Subsequent Repudiation—Untenable Grounds — Misrepresentations — Absence of Fraud—Knowledge of Subscriber—Formalities—Waiver—Prospectus—Companies Act, 7 Edw. VII. ch. 34, sec. 95—2 Geo. V. ch. 31—Organisation of Company—Action for Calls—"Commence any Business"—Sec. 112—Interest—Counterclaim.

The plaintiff company, incorporated under the Ontario Companies Act, sued the defendant, who was a broker at Fort William, for calls upon 100 shares of stock, alleged to have been subscribed for by and allotted to the defendant. The defendant paid the first call, but refused to pay the second, third, and fourth calls of ten per cent. each.

The defendant made a general denial of liability. He denied the incorporation of the company; denied that any shares were allotted to him; and disputed the validity of the calls. He also alleged misrepresentations, and said that, if he subscribed for or promised to take stock, it was upon the express condition that, if the company was unable to obtain subscriptions for stock to an amount sufficient to pay for lots to be purchased from McKellar Brothers, there was to be no liability. Other special conditions were set out in the statement of defence, and a special reply to all these was made by the company.

The action was tried at Port Arthur, without a jury.

C. A. Moss and J. E. Swinburne, for the plaintiff company.

W. F. Langworthy, K.C., for the defendant.

BRITTON, J.:— . . . Those of the citizens of Fort William who were desirous of having this company formed—the promoters, of whom the defendant was one—on or about the 4th June, 1912, entered into an agreement, in writing and under seal, to take stock in the company then to be formed; and by this agreement the defendant was bound to take 100 shares. The agreement is as follows: "We, the undersigned, hereby covenant and agree each with the other to subscribe for and take shares of the capital stock of a company to be incorporated and known as 'The Fort William Grain Exchange Limited,' or otherwise, as may be agreed upon, for the purpose of erecting a grain exchange, sample market, and office building in the city of Fort William, and acquiring the site therefor, at a cost of not more than $500,000, to the par value of the amount set opposite our respective names, and to pay for the same in five equal instalments as follows: one-fifth cash, and the balance in four equal instalments, payable within three, six, nine, and twelve months, respectively, from the 1st day of July, 1912. This is upon condition that the Dominion Grain Commission agrees to rent two floors of the said building." This was signed and sealed by the defendant and a number of others.

Pursuant to what was agreed upon, application for incorporation was made, and the plaintiff company was incorporated under the Companies Act, 1907, by letters patent dated the 29th July, 1912. . . .

Many of the promoters signed a formal application for shares, and their acknowledgment of allotment of these shares. The defendant signed the following:—

"To the Fort William Commercial Chambers Limited and the Provisional Directors thereof.

"I hereby apply for and agree to take 100 shares in the Fort William Commercial Chambers Limited or such smaller number as may be allotted to me.

"Dated at Fort William this 29th day of July, 1912.

"M. H. Braden.

"I hereby acknowledge having received notice from the Fort William Commercial Chambers Limited that 100 shares in the said company have been allotted to me, in accordance with my application.

"M. H. Braden."

Then a document was drawn up, and signed, so far as appears, by all the then stockholders, including the defendant:—

"Fort William Commercial Chambers Limited.

"We, the undersigned, the provisional directors, incorporators, and all the subscribers to the stock of the Fort William Commercial Chambers Limited . . . do hereby waive notice of the time, place, and purpose of the first meeting of the stockholders of the said company, and do fix . . . the time and place of the first meeting of the incorporators, provisional directors, and subscribers to the stock of said company.

"And we do hereby waive all the requirements of the statutes as to the notice of this meeting, and the publication thereof; and we do consent to the transaction of such business as may come before said meeting.

"Dated this 29th day of July, 1912."

It was signed by the defendant, by Perry and Dean, and about thirty others.

Pursuant to that agreement, the provisional directors met on the 2nd August, 1912, at the time and place appointed, and proceeded to allotment. The defendant had agreed to take 100 shares of stock, which were allotted to him. All the stock subscribed for was allotted.

After the meeting of the provisional directors was over, a meeting of shareholders was held. That was the first meeting of shareholders and was to be considered as the statutory meeting. All the requirements of the statute in regard to that meeting were expressly waived.

The defendant was present at that meeting of shareholders, and he allowed his name to be put in nomination for director, and upon a ballot being taken he was elected as director.

Immediately after the adjournment of the shareholders' meeting, a directors' meeting was held. The defendant took part—an active part—in the proceedings, moving and seconding resolutions. He seconded the passing of a by-law authorising an agreement with the McKellars, and he was present and assented to other important business being transacted.

A formal notice to the defendant of allotment was sent to him on the 2nd August, 1912.

On the 30th July, 1912, the defendant signed, as director, two important agreements . . .

The defendant attended a meeting of the directors on the 3rd August, and seconded the resolution making the call of 2½ per cent. upon the stock. Notice of this call was sent out,

and the defendant subsequently paid the 2½ per cent. on the $10,000. . . .

The defendant did not attempt to withdraw until the 10th April, 1913. In the defendant's letter he does not allege any misrepresentation of any existing facts, but his complaint was that the directors had gone beyond what was their intention or beyond their statement of intention.

In any such undertaking the directors must necessarily be at liberty from time to time to change their plans, for all of which they are responsible to the shareholders; but this is no ground for any shareholder to repudiate and refuse to pay for his shares.

The defendant represented himself to others as a shareholder; and, so far as appears, a fair inference would be that, by his so representing and so acting, others who perhaps would not have become shareholders did so in this.

The defendant, as it seems to me, has waived any formalities in reference to this stock. The calls were properly made; the defendant had notice of these calls; he not only signed the agreement that he would take the shares, but he signed in the books of the company an undertaking to accept the shares if they were allotted to him, and they were so allotted.

As to misrepresentation, that is a question of fact. I find there was no misrepresentation. . . . This case is entirely free from the slightest suspicion of fraud. . . . I find . . . that "there was no misrepresentation of an existing fact or an existing intention." It seems to me quite impossible that the defendant wholly or in any material respect relied upon the representation of any one. He had as full and complete knowledge of what had been done, and what was intended, as any one of those who promised to subscribe or did subscribe for shares. . . .

Want of prospectus. The Act in force when this company was incorporated was 7 Edw. VII. ch. 34 (1907, O.), sec. 95 of which defines "prospectus." It is practically an invitation or offering to the public for subscription or purchase shares or debentures or other securities of the company. There was not in this case, when the defendant became a shareholder or subscriber for shares, if he ever became such, any invitation to the public to subscribe for shares, or any offering of shares within the meaning of the Act. The object of the Act was to protect the public—not to protect a promoter or an original subscriber for stock. I am of opinion that the objection of want of pro-

spectus is not open to the defendant. If a prospectus in this case was necessary, the defendant is one of those to blame for not having one issued and filed. To allow it as a defence in this action would be allowing the defendant to take advantage of his own wrong.

Then, by 2 Geo. V. ch. 31 (1912), part VII. is made to apply to every company whether formed before or after the passing of that Act. The defendant contends that the Act applies; if so, the objection of want of prospectus cannot be taken unless taken within ten days after notice of allotment: sec. 99, sub-sec. 4. The notice of allotment to the defendant was on the 2nd August, 1912. Objections were not formally taken until in this action. The allotment was on the 29th July, 1912, and the defendant waived all objections to this. The defendant's attempted withdrawal was not until 1913.

Allotment. I am of opinion that the allotment, in view of the defendant's waiver and consent, must be considered legal and binding upon him. The meeting of the 2nd August, 1912, was a statutory meeting. Even if the defendant had the right to treat his subscription for stock as voidable, that right expired in one month after the statutory meeting.

The notice to the defendant of allotment to him was sent on the 2nd August, 1912. A call was made upon all shares of 2½ per cent., and on the 23rd August, 1912, the defendant paid the 2½ per cent., for which he counterclaims in this action. An irregular allotment renders a contract for shares voidable only; some steps should have been taken by the defendant to rescind; but, instead of that, the defendant validated the allotment by his writing and by general acquiescence and by payment of the first call.

At the time of the formation of this company, and after, during all the time when the defendant was acting, and when business of the company was being done, the company, as between it and the non-paying original shareholders, must be treated as a private company. . . .

The case of Purse v. Gowganda Queen Mines Limited, 1 O.W.N. 420, 1033, 15 O.W.R. 287, 16 O.W.R. 596, is in point in the plaintiff company's favour.

The case for the plaintiff has not been met by the defendant. If the section of the Act of 1912 in reference to commencement of business (sec. 112) is applicable to this case, I am of opinion that suing for calls upon unpaid stock is not commencing business within the meaning of the Act.

The company has been organised.

The plaintiff company is entitled to judgment for $3,140.69, being for second, third, and fourth calls of $1,000 each upon 100 shares of stock, and interest. . . .

There will be a declaration that the defendant is a shareholder in the plaintiff company to the amount of 100 shares, and that he is liable for the unpaid calls made since the commencement of this action and interest thereon, and that he is liable, too, for the unpaid balance of the said stock as the same has been or may be called.

The judgment will be with costs. The counterclaim will be dismissed with costs.

MIDDLETON, J. MARCH 3RD, 1914.

RE MAY.

Will—Construction—Gift to Widow for Life of Rents of Real Estate—Sale and Division of Proceeds between Children at Death of Widow—Life-tenancy—Lands Subject to Mortgage—Deduction from Rents of Interest and Taxes—Power of Executors to Sell—Outgoings of one Property Exceeding Income—Payment of Excess by Widow—Claim for Repayment to her.

Motion by the executors of one May, deceased, for an order determining two questions arising upon the construction of his will, after the death of his widow.

J. R. L. Starr, K.C., for the executors.

J. A. Macintosh, for the executrix of the widow.

E. C. Cattanach, for the Official Guardian, representing the infants.

MIDDLETON, J.:—The testator directed that all rents from his real estate should be paid to his wife for life, and on her death the lands should be sold, and the proceeds divided between his children. The wife is now dead.

The lands of the deceased were subject to mortgages. That on Winchester street yielded a gross rental of $3,787, net $2,653.61; Parliament street lands yielded only $340, while interest and taxes amounted to $1,326.44. The widow has paid the deficit, $986.44, out of the Winchester street rents.

Two questions are raised. The executrix of the widow contends that the widow was entitled to the gross rental, without any deduction for taxes, etc., or for interest.

The gift to her of the rent makes her a life-tenant, and she must bear the burden properly incident to her life estate—including the payments in question. No intention is here shewn to exonerate the lands from the debt charged on them by the mortgage; indeed, the contrary intention is clearly indicated, as the lands might be sold by the executors, and in that case, the will provides, the mortgage is to be paid out of the proceeds, and the widow is to receive the interest on the balance only.

Then the argument is made that the outgoings of the Parliament street property exceeded the income, and so the widow's estate should be repaid this excess. I do not think so. The life estate was given in all the testator's property, and the widow was not given the right to pick and choose. She must take the fat with the lean—the bitter with the sweet; she accepted the devise, and must bear all the burden.

The case is not at all like In re Cameron, 2 O.L.R. 756. There was a duty to realise, but realisation was delayed in the interest of the remaindermen, and this was not allowed to be at the expense of the life-tenant. Here there was not any duty to sell till the termination of the life estate.

The contentions put forward by the representative of the widow fail.

Costs may be paid out of the estate.

MIDDLETON, J. MARCH 4TH, 1914.

RE GAULIN AND CITY OF OTTAWA.

Municipal Corporation—By-law Providing for Submission of Scheme for Water Supply to Vote of Electors—Municipal Act, sec. 398, *sub-sec.* 10—*Form of Ballot—Prevention of Fair Expression of Wishes of Electorate—Order Quashing By-law.*

Motion to quash a by-law of the City of Ottawa.

W. N. Tilley, for the applicant.

G. F. Henderson, K.C., and F. B. Proctor, for the Corporation of the City of Ottawa.

MIDDLETON, J.:—The Municipality of the City of Ottawa, being face to face with difficulty in obtaining an adequate water supply, the municipal council desired to obtain the opinion of the electorate as to the scheme which had commended itself to the council. The by-law in question is passed in supposed pursuance of the powers afforded by the Municipal Act, sec. 398, sub-sec. 10, which permits the passing of a by-law "for submitting to the vote of the electors any municipal question not specifically authorised by law to be submitted." The provisions of the Act and the forms provided indicate that the intention of the Legislature in permitting this reference to the electors was, that the question should be submitted in such a form as to permit of an answer, "Yea" or "Nay." No doubt, several questions may be submitted at the same time, but they must be submitted independently, so that each elector may have the opportunity of expressing his opinion upon each question submitted.

The by-law in question is not within what is permitted by the Municipal Act, because it is an endeavour, by the substitution of a tricky and adroitly drawn question, practically to preclude any true expression of the views of electors upon the question proposed to be submitted.

I would not interfere with the municipal action for any mere irregularity, but I think it is my duty to interfere when what is proposed will have the effect of preventing any fair expression of the wishes of the electorate from being obtained.

What has been done in the proposed submission is, to provide a ballot which, instead of containing two compartments in which the elector may place his cross as indicating an affirmative or negative answer—which is what is contemplated by the Municipal Act—divides the affirmative section into five sub-heads, one for each of the suggested schemes. The voter is then told that if he is opposed to all these, or to any change, he should mark his ballot in the negative. If he approves of any of these schemes, he is to place his mark opposite the scheme of his choice.

Manifestly there are two distinct matters to be determined by the vote: first, do the ratepayers desire the adoption of any scheme changing the present condition of affairs? and, secondly, if so, what scheme do they desire?

Two by-laws, proposing different schemes, have already been submitted to the ratepayers. In round figures, each received an affirmative vote of 1,000 and a negative vote of 5,000.

These questions are to be submitted, not to the ratepayers, but to the electors; and it is admitted that a large number of

electors desire to negative any change. One of the schemes proposed is said to involve a very heavy expenditure as compared with the others suggested. It may be that the merits of this scheme so outweigh the disadvantage of the expense that it ought to be adopted; but it is safe to say that many of those who vote on the negative as to change, would vote in favour of one of the less expensive schemes as against the more expensive one. What is sought is to stifle such a vote.

To illustrate the way in which the matter may work out, assume that 20,000 votes are cast; 9,999 being against any change and 10,001 in favour of a change. It can then be said that there is a majority in favour of the change. But the vice of the proposed ballot is, that the 9,999 who vote against any change are prevented from expressing any preference amongst the competing schemes, assuming that a change is to be made.

It may be that half of the 10,000 voting in favour of change will vote for the more expensive scheme; the remaining vote may be equally divided between the four cheaper schemes. It will then be said that that scheme is favoured by four times as many voters as any of the others. It would be quite conceivable that 9,999 would have voted in favour of one of the less expensive schemes. In that event, the majority against the expensive scheme would be as three to one.

I give this illustration to shew that the by-law is not quashed upon any narrow or technical ground, but because it appears to be an attempt to stifle the free expression of the opinion of the electors rather than to obtain it.

BRITTON, J. MARCH 5TH, 1914

RE McKENZIE AND VILLAGE OF TEESWATER.

Municipal Corporation—By-law Authorising Conveyance of Public Square to Public Library Board for Library Building Site—Powers of Corporation—58 Vict. ch. 88(O.)—Conveyance to Board—Public Libraries Act, 9 Edw. VII. ch. 80, secs. 8, 12.

Motion by a ratepayer for an order quashing a by-law passed by the Council of the Village of Teeswater.

G. H. Kilmer, K.C., for the applicant.
W. Proudfoot, K.C., for the village corporation.

BRITTON, J.:—The by-law now attacked enacts that the Corporation of the Village of Teeswater do grant and convey to the Teeswater Public Library Board part of the parcel of land known as "Edmund square" in the village, for the "purpose of a site for a public library building." The by-law was passed on the 23rd January, 1914, and, apparently on the same day, the conveyance authorised by the by-law was executed and registered in the registry office for the county of Bruce. The title to the land in question now stands in the name of the Public Library Board.

An authority for the by-law, and, as alleged by the applicant, the only pretence of authority, is the Ontario statute of 58 Viet. ch. 88 (1895), and the provisions of that Act are correctly set out in the preamble of the by-law. Of the objections taken to the by-law, the only one necessary to be specially considered on this application is the one raised by the question: Can the Corporation of the Village of Teeswater enact such a by-law as the one attacked, and, pursuant to it, convey the land directly to the Teeswater Public Library Board, or will it be necessary that the village corporation make an actual sale of the land, and, so far as relates to the "purpose of a public library," deal only with "the money realised." The preamble of the Act shews how the village became the owner of Edmund square. Section 1 enacts: "The Corporation of the Village of Teeswater may pass a by-law or by-laws for leasing or selling such portions of the said land as they may not require for the purposes of a market square or other public purpose, and may by such by-law or by-laws authorise the leasing or sale of the same, in one or more parcels, and either by public auction, tender, or private contract, and on such conditions as to the said corporation may seem proper." Section 5: "The moneys realised from such leases or sales shall be applied to payment of compensation to persons whose properties front on said square, and to the costs of and in connection with the application for this Act, and the balance thereof shall be applied to the purchase of a park or fair ground, either jointly with any other municipality or municipalities or otherwise or for the purpose of a public library, as the Corporation of the said Village of Teeswater shall direct, but no lessee or purchaser shall be bound to see to the application of any such moneys." Section 6: "It shall not be necessary to obtain the consent of the electors of the said town to the passing of any by-law under this Act, or to observe the formalities in relation thereto prescribed by the Consolidated Municipal Act, 1892, or any Act amending the same."

Part of this square was sold in 1896 or prior thereto. Out of the proceeds were paid all the costs of the application for and obtaining the special Act, and all compensation to those having land fronting on the square was paid, so the way was cleared for getting a site and the erection of a building for a public library, if the corporation would assist. As the Public Library Board desired a site for the library building, and as the land was unproductive, and not wanted by the village, and was suitable for the library building, the corporation took the short cut of passing the by-law and conveying the land directly to the Public Library Board. No harm has been done. The council acted in perfect good faith, and their work should not be interfered with unless want of jurisdiction is perfectly clear.

See Parsons v. City of London, 25 O.L.R. 173; Phillips v. City of Belleville, 11 O.L.R. 256.

What is set out in the affidavit of the applicant has little to do with the question for my decision, but some of the applicant's statements are denied by Farquharson, the Clerk of the Corporation of Teeswater. Mr. Farquharson states that the whole of the purchase-price of the land purchased under by-law No. 10 of 1896 was paid from the proceeds of debentures issued and sold. That being the case, it cannot be said that any part of the proceeds of the sale of the remainder of Edmund square is held for the payment of the three remaining unpaid debentures of $60 each. No illegality or irregularity appears in the establishment of the public library in Teeswater. The fact of the petition being presented to the council by many electors has no bearing upon the case, but even that is explained by Mr. Farquharson.

The intention of the members of the council in 1896, as expressed in the by-law No. 10, cannot bind the council of 1914.

Section 12 of the Public Libraries Act, 9 Edw. VII. ch. 80 (1909), is not contravened by a conveyance of this property to the Public Library Board. The levy of half a mill or three-quarters of a mill in each year is in no way affected by a special grant or conveyance of property owned by the village to the Public Library Board.

Section 8 of the last-recited Act places no difficulty in the way of the Public Library Board accepting this land. By sub-sec. 1 of sec. 8, the Board must procure, erect, or rent the necessary buildings; sub-sec. 2 restricts the amount in any one year to $2,000 without the consent of the council. The conveyance to the Public Library Board implies the consent of the council, if that were necessary.

By sub-sec. 5 of sec. 12, the council may issue public library debentures for the purpose of acquiring a site, etc.

Ottawa Electric Light Co. v. City of Ottawa, 12 O.L.R. 290, comes nearer to supporting this motion than any case I can find. But that case seems to me distinguishable from this case. The special Act authorised the production of electricity for motive power, etc. The by-law there attacked attempted to authorise an agreement to supply. One of the main objects of that Act was the production—the manufacture in Ottawa. The production there involved large outlays for plant, wages, etc.—a very different thing from purchasing electricity produced elsewhere.

Here the only thing sought was to procure a site—that the Public Library Board was entitled to, and the corporation of the village bound in some way to furnish. The objection is not what was done, but to the way it was done. Under all the circumstances, the by-law should not be quashed.

Application dismissed with costs.

MIDDLETON, J. MARCH 7TH, 1914.

RE FAIRCHILD.

Will—Construction—Provision for Daughter—"Home with her Mother" while Unmarried—Death of Mother—Termination of Life Estate.

Originating notice to determine the question of the rights of Sarah Jane Butler under the will of the late Peter Fairchild.

J. Harley, K.C., for the executors.
M. W. McEwen, for Sarah Jane Butler.

MIDDLETON, J.:—The late Peter Fairchild, who died about nineteen years ago, by his will, made not long before his death, gave his farm to his son Peter M. Fairchild, subject to the right of his widow "to have a home where she now resides in the old homestead while she lives, and she is to draw her thirds while she lives from the estate for her support." This is followed by the provision in favour of the daughter Sarah Jane which gives rise to the present application: "And I also direct that my daughter Sarah shall have a home with her mother so long as she does not marry again."

Sarah had been married, but her husband had deserted her. She and her infant children were, at the time of the testator's death, living as part of the household. After his death she continued to live upon the property during the lifetime of the widow. Upon the widow's death, Sarah still remained as housekeeper for her brother Peter M. Fairchild, who never married.

Peter M. Fairchild died on the 28th November, 1913. By his will he gave a farm to his sister Sarah and one of her sons, subject to payment of a legacy to the other of her sons. The rest of his estate, after payment of certain legacies, he directed to be realised and divided among his sisters, nephews and nieces, share and share alike.

Notwithstanding the provision made for Sarah under her brother's will, she claims to be entitled to a home upon the old homestead under the will of her father.

This claim is, I think, untenable. What she is given by that will is a right to a home with her mother. The mother has been given practically a life estate in the homestead, and the testator then gives to his daughter the right to remain with the mother on the old homestead during the mother's life. Upon the termination of that life estate her rights came to an end. During her brother's lifetime she remained upon the property, but that was a matter of arrangement with him, and the brother seems to have very fairly provided for her by giving to her and her children the farm mentioned in his will, in addition to a share in his estate.

It should be declared that any interest given to Sarah Jane Butler under the will of the late Peter Fairchild came to an end upon the death of his widow, and she has now no claim upon the land under his will.

Costs out of the estate.

MIDDLETON, J. MARCH 7TH, 1914.

RE ROCQUE.

Will—Construction—Residuary Bequest—Division of Residue among three Children and one Grandchild—One of the Children Dead at Date of Will—Intestacy as to one-fourth of Residue.

Motion to determine a question arising on the construction of the will of Margaret Jane Rocque, deceased.

E. Coatsworth, K.C., for the executors.

J. R. Meredith, for the infant children of Catharine A. Rocque.

R. Nesbitt, for the adult children.

MIDDLETON, J.:—By her will, dated the 12th August, 1911, the testatrix, who died on the 31st December, 1913, gave $1,000 to be divided between the children of her daughter Catharine, reciting that she had already given $1,000 to her said daughter. After making certain other provisions for other children, she provided that the residue of her estate be divided into four equal parts: between her executor (a grandson) and her said three children. The "said three children" are her two sons and her daughter Catharine.

Catharine had died on the 7th March, 1906, more than five years before the making of the will. The conveyancer had evidently failed to apprehend the situation, and in some way was at cross purposes with the testatrix.

It appears to me that I must take the will as it reads, and that I am not at liberty to guess what the testatrix would have done if her attention had been drawn to the matter. It may be that the testatrix did not intend to give to the children of Catharine more than $1,000, and that she intended that the residue should be divided equally between the executor and her sons, and that the error is in the enumeration; or it may be that she intended to direct that the share which would have come to Catharine if she had been alive should be divided among her children. The will gives no key, and I must take it as it stands. The executor and the sons are each given a fourth of the residue. The gift to Catharine cannot take effect, because she was then dead. There is no gift to Catharine's children; therefore, there is an intestacy as to this fourth.

The costs of all parties may come out of the estate.

MIDDLETON, J. MARCH 7TH, 1914.

RE DORAN.

Will—Construction—Devise—Life Estate—Vested Remainder—Death of Remainderman—Direction for Conversion—Right of Heirs to Take in Specie.

Motion to determine certain questions arising on the will of John Doran, deceased.

J. Harley, K.C., for Esther Ann Force.
M. W. McEwen, for her husband.
A. E. Watts, K.C., for the executors.

MIDDLETON, J.:—John Doran died on the 2nd August, 1895, having first made his will, dated the 23rd July, 1884, by which he devised certain lands to his daughter Esther Ann Force for life, free from the control of her husband. Upon the death of the daughter, he directed the lands to be sold and the proceeds to be divided among his brothers. By a codicil to the will, dated the 11th April, 1898, made after the birth of the only child born to Mrs. Force, the testator directed his executors to hold the land, after the death of his daughter, in trust for the child or children of her then present or any future marriage, and that, after the sale, the executors should apply the income towards the maintenance of the children, dividing the proceeds when the youngest child attains twenty-one, if more than one, and handing over the proceeds to the child on its attaining majority, if there is only one.

The child died when fourteen years old, on the 25th October, 1899. I think the interest was vested in the child, and upon its death its father and mother took as its heirs. There is no need for the conversion of the remainder, and they may take it in specie.

The costs of all parties may come out of the estate.

MIDDLETON, J. MARCH 7TH, 1914.

GAULIN v. CITY OF OTTAWA.

Municipal Corporation—Submission of Question to Vote of Electors—Municipal Act, sec. 398(10)*—Proceeding Previously Determined to be Illegal—Injunction—Motion for Judgment.*

Motion for an interim injunction restraining the defendants, the Corporation of the City of Ottawa, from submitting to the vote of the electors a certain question, referred to in Re Gaulin and City of Ottawa, ante 30.

W. N. Tilley, for the plaintiff.
H. M. Mowat, K.C., for the defendants.

MIDDLETON, J.:—A by-law of the defendants for the taking of a certain vote has been quashed, but the defendants intend nevertheless to go on and take the vote, apparently upon the theory that a vote may be taken by a municipality without a by-law so directing.

Prior to the passing of the statute now sec. 398(10) of the Municipal Act, the right to submit any question to the electorate was by no means clear. See Helm v. Town of Port Hope, 22 Gr. 273; Davies v. City of Toronto, 15 O.R. 33; Dalby v. City of Toronto, 17 O.R. 554; King v. City of Toronto, 5 O.L.R. 163.

The statute was passed for the express purpose of defining the conditions under which a vote on any municipal question may be taken. It has been held that this vote is something quite outside of what is permitted by the Act and is not in conformity with its provisions. It follows as a matter of course that an injunction must now be awarded to restrain a proceeding already determined to be illegal.

As this injunction determines all that is involved in the action, this motion should be turned into a motion for judgment, and the order should be framed accordingly.

The plaintiff is entitled to his costs.

FEHRENBACK v. GRAUEL—LENNOX, J.—MARCH 2.

Vendor and Purchaser—Agreement for Sale of Land—Action for Instalment of Purchase-money—Ability of Vendor to Convey—Right to Rescission—Damages—Limitation of—Abatement of Purchase-money—Application of Payment—Costs.]—Action to recover $3,330 and interest, money alleged to be due by the defendant under an agreement for the sale of land. The learned Judge said that the plaintiff acted in good faith, and, when he entered into the contract, was justified in believing that by the time the defendant became entitled to a deed he (the plaintiff) would be in a position to convey. The recitals in the agreement were sufficient to give notice to the defendant of the chain of assignments leading to the plaintiff; and the defendant was aware of the arrangement with one Zettle. There was no obligation upon the plaintiff to convey until the defendant paid in full; and the defendant was not entitled to damages. At most, if he had elected to rescind, he would be entitled only to the expense of investigating the title and preparation of

the conveyance: Bain v. Fothergill (1874), L.R. 7 H.L. 158; Gas light and Coke Co. v. Towse (1887), 35 Ch.D. 519; Ontario Asphalt Block Co. v. Montreuil (1913), 4 O.W.N. 1474, 5 O.W.N. 289, 29 O.L.R. 534. The defendant appeared to have been allowed $200, and in adjusting the accounts it must be made clear that he has the benefit of an abatement to this extent as of the date of a certain cheque for $7,290. The defendant made no application of the money at the time of payment, excepting in so far as the wording of the cheque affected the question; and the plaintiff had a right to apply it without reference to future instalments, under the terms of the agreement, and because he was releasing a part of his security.—The learned Judge said that he would like to relieve the defendant from payment of costs, as he has been at some inconvenience and loss; but, as this had been without fault of the plaintiff, there was no discretionary right to relieve him except upon terms.—Judgment for the plaintiff for the $3,000 instalment due on the 1st November, 1913, with interest upon the outstanding balance at the contract-rate to that date, and interest since then at five per cent., with costs; but, if the defendant would undertake not to carry the action to appeal, the judgment would be without costs. R. McKay, K.C., and A. L. Bitzer, for the plaintiff. W. H. Gregory, for the defendant.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. DEAN—BRITTON, J.—MARCH 2.

Company—Shares—Subscription for—Allotment — Acceptance—Acting as Shareholder—Action for Calls—Liability.]—A similar action to Fort William Commercial Chambers Limited v. Braden, ante 24. It was agreed that the evidence taken in the Braden case should be used in this case so far as applicable and relevant. The only difference was that the defendant Dean did not act as a director. He did, however, attend meetings of shareholders, and signed documents as did Braden. The learned Judge said that Dean, in this undertaking, seemed to have cast his lot in with Braden—only objecting to payment of calls because Braden objected. There should be judgment for the plaintiff with costs for $3,140.69, being for second, third, and fourth calls of $1,000 each on 100 shares of stock and interest. Declaration that the defendant is the holder of 100 shares in

the stock of the plaintiff company, and that he is liable to pay the unpaid calls made since the commencement of this action and interest thereon, and is liable for the unpaid balance of the said stock as the same has been or may be called. Counterclaim dismissed with costs. C. A. Moss and J. E. Swinburne, for the plaintiff company. W. F. Langworthy, K.C., for the defendant.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. PERRY—BRITTON, J.—MARCH 2.

Company—Shares—Subscription for—Allotment—Acceptance—Election of Subscriber as Director—Acting as Shareholder and Director—Action for Calls—Liability.]—This action was similar to that of Fort William Commercial Chambers Limited v. Braden, ante 24. The defendant subscribed for 50 shares, and was elected a director and became president of the company. Judgment for the plaintiff company with costs for $1,570.35, the amount of the second, third, and fourth calls and interest. Declaration that the defendant is a shareholder in the plaintiff company to the extent of 50 shares, and that he is liable to pay the unpaid calls made since the commencement of the action and interest, and that he is liable for the unpaid balance of the price of the shares as and when called. Counterclaim dismissed with costs. C. A. Moss and J. E. Swinburne, for the plaintiff company. W. F. Langworthy, K.C., for the defendant.